in this case, he submitted that there was no need for the court to refer to *Mahadevan & Anor* v *Manilal & Sons (M) Sdn Bhd.*[3]

We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank's* case but with a deed of assignment. We would therefore reiterate what this court has said in *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd*[1] that 'whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself'. Now, whatever the parties might have as lay men stated in their correspondence between themselves, they had elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a) that the sale and purchase agreement dated 13 April 1981, made between Penang Garden Sdn Bhd of the one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all reasonable steps to obtain a subsidiary title to it; and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of $1m to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:

> In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee all his right title and interest in and to the property and under the said agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Looking at the document we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property. As we have come to the conclusion that it was an absolute assignment we did not think it necessary to consider the contention of counsel that an equitable charge was made in this case. The appeal of the defendant was therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Jayaraman, Ong & Co*; *Cheong Wai Meng & Van Buerle.*

Reported by *Prof Ahmad Ibrahim*

Muluk bin Ahmad & Anor v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) – CRIMINAL APPEAL NO 37 OF 1986
LEE HUN HOE CJ (BORNEO), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
5 JANUARY AND 3 APRIL 1989

Criminal Procedure – Charge of murder – Cautioned statement – Trial within a trial – Right of defence to recall witnesses in respect of cautioned statement in a trial within a trial before a jury – Criminal Procedure Code (FMS Cap 6), 214(iii)

In this case the two appellants had been charged with four offences of murder under s 302 of the Penal Code. They were found guilty and convicted on the alternative verdict under s 301 of the Penal Code and sentenced to ten years on each charge, the sentences to run concurrently. They appealed. On the appeal, the court decided to hear the parties on one main issue, that is, the right of the defence to recall witnesses in respect of a cautioned statement in a trial within a trial before the jury. The learned trial judge had rejected totally the application of the defence to recall witnesses in a trial within a trial before the jury.

Held, allowing the appeal:

(1) Following the case of *Yau Sun Fatt* v *PP*,[3] a cautioned statement may sometimes be the mainstay of the case for the prosecution and the opportunity of the accused to repeat his allegations to the jury before the close of the prosecution's case is the proper and indeed the fairest way of enabling the jury, as sole judges of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by s 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution.

(2) The failure to allow the accused to repeat his allegations in the presence of the jury has deprived him of a fair trial. A conviction so arrived at could not stand.

(3) The conviction and sentence is quashed and a retrial ordered.

Cases referred to

1 *Yaacob* v *PP* [1966] 1 MLJ 67 (refd)
2 *Lee Kok Eng* v *PP* [1976] 1 MLJ 125 (refd)
3 *Yau Sun Fatt* v *PP* [1988] 1 MLJ 248 (folld)
4 *R* v *Francis & Murphy* (1959) 43 Cr App R 174 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 214(iii)

Appeal from: Temerloh Criminal Trial No 2 of 1985 (High Court, Temerloh)

TS Marbeck (*Yusof Khan* with him) for the appellants.
Abdul Hamid bin Mohamed (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (delivering the judgment of the court): We allowed the appeal, set aside the conviction and quashed the sentence. A retrial was ordered. We stated we would give our reasons later. We do so now.

The facts may be stated shortly. On 23 May 1984 at about 11.00 am, four deceased, namely, Chong Voon

Khim *alias* Chong Voon Khin, Ching Thin Man, Chan Siew Fan *alias* Chong Siew Fan and Len Yew Fah, went fishing at the fish ponds at their rubber smallholding at Sungei Mas, Taat Seng Estate, Raub, Pahang. On that day Platoon No 2 of A Company of the 8th Royal Malay Regiment was deployed near Pimco Estate not far away from the fish ponds. The platoon was under the command of 2nd Lieutenant Mohd bin Md Jais. The platoon was temporarily deployed there to collect their rations and salaries. 2nd Lieutenant Jais instructed five members of his platoon to patrol the vicinity of the area. Accused 1 and accused 2 were among the five selected. They left their base in the early morning and later in the morning they reached the fish ponds. Expended cartridges at the scene indicated that they were fired by two rifles used by accused 1 and accused 2. The four deceased were shot at, not once, not twice but not less than 13 bullets were fired at their heads. The cause of death of each deceased was as a result of extensive head injury with complete destruction of the brain. The two accused were charged with four offences of murder under s 302 of the Penal Code. They were, however, found guilty and convicted on the alternative verdict under s 301 of the Penal Code and sentenced to ten years on each charge and the sentences were to run concurrently. They appealed.

The court decided to hear the parties on one main issue in the appeal, that is, the right of the defence to recall 'witnesses' in respect of a cautioned statement in a trial within a trial before a jury. The learned judge rejected totally the application of the defence to recall witnesses in a trial within a trial before a jury. In Vol II, p 445 we found the following:

> Encik Faiza: Since recording officer has recorded P90, I would like the witnesses in relation to P90 to be cross-examined in presence of jury. Please see *Lee Kok Eng* v *PP* [1975] 1 MLJ 125.
>
> Court: I think witnesses in the voir dire will give evidence when defence is called assuming it is called. We are concerned with the trial within the trial now.
>
> DPP: I agree.

Encik Yusof Khan who appeared for the defence in the High Court cited *Yaacob* v *PP*[1] and *Lee Kok Eng* v *PP*[2] to support the proposition that the proper time for defence to recall witnesses would be before the close of the prosecution's case in a trial within a trial. In Vol III p 708 the record of proceedings shows:

> DPP: *Yaacob's* case – authority to say that defence has right to cross-examine witnesses trial within trial – not authority for that right to be exercised immediately. More sensible and logical procedure that is adopted. Earlier ruling applies.
>
> Court: Accused may give evidence on general issue of case and on specific issue as to voluntariness. He has a right to call witnesses. And prosecution may before close of prosecution case call any witness it likes.

Before us the case of *Yau Sun Fatt* v *PP*[3] was cited. The contention of Encik Abdul Hamid bin Haji Mohamad for the respondent is that *Yaacob's* case[1] is only an authority for giving the defence an opportunity to call or recall witnesses before a jury. It is not an authority for saying that it must be done before the close of the prosecution. *Lee Kok Eng's* case[2] merely confirmed *Yaacob's* case.[1] *Yau Sun Fatt's* case[3] was the first case to rule that opportunity must be given to the defence to recall witnesses before the close of the prosecution's case. He submitted that *Yau Sun Fatt's* case[3] relied on *Yaacob's* case[1] which merely said opportunity must be given in due course and *R* v *Francis & Murphy*[4] which was neutral really as it merely stated witnesses might be called during the trial. This court was influenced by the fact that the appellant chose to remain silent.

At p 250 of *Yau Sun Fatt's* case[3] it is explained thus:

> How could this be possible if the accused chose to remain silent when called for his defence, as the jury would not have heard his allegations. If the weight and value of the cautioned statement were matters for the jury then it is only right that they should be allowed to hear the allegations of the accused. The accused must be given the opportunity to be heard by the jury before being called upon to enter into his defence. As Lord Goddard said in *R* v *Murray* 34 Cr App R 203 at 207 concerning the confession:
>
> 'Its weight(of the confession) and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it has been obtained.'
>
> The truth of the confession is not directly relevant at the voir dire, but it will be a crucial question for the jury once the judge admits it.

It is only right to point out that the learned judge made the ruling in 1986 whereas *Yau Sun Fatt's* case[3] was decided in 1988. He chose the most convenient and time-saving course. That was also the course adopted by the learned judge in *Yaacob's* case.[1] Nevertheless, it must be stressed that this court did not support the learned judge's interpretation of the words 'due course' in *Yaacob's* case[1] to mean that the accused could give evidence in his defence and could repeat his allegations. This court made clear that once the cautioned statement was admitted 'the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned judge alone to testify again in the presence of the jury and that would include the accused. The procedure would mean that the accused would not have to wait until the defence is called.'

The judgment in *Yau Sun Fatt's* case[3] concluded in these words:

As the accused chose to remain silent after the close of the prosecution's case, the failure to allow him to repeat his allegations in the presence of the jury has deprived him of a fair trial. A cautioned statement such as that produced in the instant appeal may sometimes be the mainstay of the case for the prosecution, and the opportunity to repeat his allegations to the jury before the close of the prosecution's case is the proper and indeed the fairest way of enabling the latter, as sole judge of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by s 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution. Consequently, we consider that a conviction so arrived could not stand. Therefore, we allowed the appeal, set aside the conviction, quashed the sentence and ordered a retrial.

If this procedure is considered to be tedious, inconvenient and time-consuming the proper remedy would be for the legislature to amend the law.

Appeal allowed.

Solicitors: *Yusof Lee Pathma & Marbeck.*

Reported by *Prof Ahmad Ibrahim*

Creative Furnishing Sdn Bhd v Wong Koi

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 82 OF 1988.
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
9 JANUARY AND 15 MARCH 1989

Civil Procedure – Mareva injunction – Discretion of court – Whether properly exercised – Whether plaintiff has established a good arguable case against defendant and that defendant has assets within jurisdiction – Whether there was risk of defendant's assets being dissipated before judgment – Material mispresentation by plaintiff

In this case the respondent had sued the appellant and another defendant for an alleged partnership debt for materials supplied and work done in respect of millworks on two floors of the Shangrila Inn, Penang under the terms of a sub-contract. On the date of the issue of the writ the respondent obtained ex parte a Mareva injunction against the appellant and the other defendant to restrain them from disposing or otherwise dealing with their assets not exceeding $95,000. The appellant applied to set aside the ex parte Mareva injunction. This was dismissed and the appellant appealed.

The principle issue on appeal was whether the discretionary power to issue the ex parte Mareva injunction had been properly exercised by the learned judge. It was argued (a) that the respondent's claim had nothing to do with the appellant but concerned only the other defendant; (b) that the learned judge erred in law and in fact in holding that there was a sufficient risk of the appellant's assets being dissipated before judgment.

Held, allowing the appeal:

(1) In applying for the Mareva injunction the respondent must satisfy the court firstly that he had a good arguable case; secondly that the appellant had assets within the jurisdiction and thirdly that there was a real risk of the assets being dissipated or removed before judgment in that there must be solid evidence to establish the risk.

(2) In this case on the pleadings and affidavit evidence, it could not be said that the learned judge was wrong in law or in fact in his findings that the respondent had established, in his own words, 'a good arguable claim' and had assets within jurisdiction.

(3) Mere refusal to pay a disputed debt and issuing of a dishonoured personal cheque by a director of the second defendant, who was not a party to the appeal, as presented before the learned judge, fell far too short of the necessary evidence to establish a real risk of dissipation of the assets of the appellant before judgment.

(4) Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosure of all material facts. Every material representation must not be misleading and there must not be any suppression of material acts. Failure to do so at the crucial time of making the ex parte application would invariably be fatal.

(5) In this case there was material misrepresentation made by the respondent and this was sufficiently grave to prevent the learned judge from exercising his discretion in the respondent's favour. The remaining representations made in support of the application were manifestly inadequate for the court to hold that there was a real risk of the appellant's assets being dissipated or removed before judgment.

Cases referred to

1 *Aspatra Sdn Bhd & 21 Ors* v *Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (folld)
2 *KSM Credit and Leasing Sdn Bhd* v *Data Mante (M) Sdn Bhd & Ors* [1986] 1 CLJ 500 (refd)
3 *Third Chandris Shipping Corporation & Ors* v *Unimarine SA* [1979] 2 All ER 972 (refd).

Appeal from: Civil Suit No 24-430-87 (High Court, Penang)

Cur Adv Vult

Darshan Singh Khaira for the appellant.
Balasundaram for the respondent.

Mohamed Azmi SCJ (delivering the judgment of the court): We allowed the appeal on 9 January 1989 and now give our reasons. The respondent (plaintiff) sued the appellant (first defendant) jointly and severally with Classy Homes Sdn Bhd (second defendant) for an alleged partnership debt of $82,062.68 for materials supplied and work done in respect of millworks on two floors of the Shangrila Inn, Penang, under the terms of a sub-contract. On 29 June 1987, the date of the issue of the writ, the respondent obtained by way of ex parte summons-in-chambers a Mareva injunction against both the defendants to restrain them until further order from disposing of or otherwise dealing with moneys or assets belonging to both or either of them not exceeding